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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CITIBANK, FEDERAL SAVINGS BANK,	
Plaintiff and Appellant,	**A097856**
v.	
ALEXANDER SHEN,	**(San Mateo County Super. Ct. No. 409557)**
Defendant and Respondent.	

Plaintiff Citibank, Federal Savings Bank (Citibank) appeals from a judgment rendered against it and in favor of defendant Alexander Shen (defendant), after the trial court granted defendant's motion for summary judgment and for summary adjudication of all causes of action against him. Citibank raises a host of challenges to the rulings on the motion. Based upon our independent review of the matter, we affirm the summary adjudication granted on the causes of action for conversion and constructive trust and otherwise reverse.

PROCEDURAL HISTORY

Citibank filed this lawsuit in July 1999 alleging numerous causes of action against multiple corporate and individual defendants, including defendant. In June 2001, Citibank filed the operative third amended complaint, which alleges six causes of action against defendant: fraud (fifth), negligent misrepresentation (sixth), negligence (seventh), conversion (eighth), conspiracy to defraud (thirty-third), and constructive trust

(thirty-fifth). In November 2001, defendant filed his motion for summary judgment or, in the alternative, for summary adjudication of the causes of action against him. The trial court granted both motions and this appeal followed.[1]

FACTUAL BACKGROUND

It was undisputed that in 1993 codefendant Shen Motor Company (Shen Motor) established Citibank checking account No. 600184386 (Shen Motor/Infinity account), and codefendant Shen Lincoln-Mercury, Inc. (Shen Lincoln-Mercury), established Citibank checking account No. 600184345 (Shen Lincoln-Mercury account). In 1998, Shen Motor established Citibank checking account No. 601199482 (Shen Motor account). From 1996 through 1999, these checking accounts were located in Citibank's San Mateo branch. The parties holding these checking accounts were the dealerships, not defendant. Citibank concedes that it never had a contractual debtor/creditor relationship with defendant.

Citibank asserted that from at least 1996 through June 4, 1999, defendant, codefendant Michael Shen (Alexander's father), Shen Motor, Shen Lincoln-Mercury, and other defendants engaged in a fraudulent check scheme[2] in which checks were drawn on the Shen Motor account or the Shen Motor/Infinity account without sufficient funds and were deposited into the Shen Lincoln-Mercury account, while checks of substantially identical amounts were written on the Shen Lincoln-Mercury account without sufficient funds and deposited into the Shen Motor account or the Shen Motor/Infinity account. Citibank contends that by virtue of defendant having signed at least 17,500 insufficient funds (NSF) checks on the various checking accounts (a fact never disputed by

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[1] Citibank does not challenge the summary adjudication granted on the cause of action for constructive trust.

[2] The parties debate whether the scheme is properly referred to as "check kiting." Defendant rejects that label primarily on the basis that the multiple accounts were located in the same branch of the same bank and not in different banks. We find no need to resolve this dispute. Citibank alleged a fraudulent check scheme and its allegations and the evidence submitted in support thereof can be evaluated without regard to whether the scheme is accurately referred to as a "kite."

defendant), that defendant exercised dominion and control over Citibank's funds in a manner inconsistent with Citibank's rights to its funds. Citibank presented evidence that it was unable to uncover the scheme because the operations manager for Citibank's San Mateo branch (Mildred Struempf), who should have discovered the overdrafts, participated in the scheme herself and received more than $64,500 in payments from Michael Shen during the period from May 1997 through April 1999. Struempf never reported her receipt of such payments and gratuities from this bank customer, in violation of her duties to Citibank.

DISCUSSION

I. *Standard of Review*

We review a summary judgment de novo to determine whether the moving party has met its burden of persuasion that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subd. (c).) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment. [Citation.]" (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) The moving party's affidavits are strictly construed and the opponent's are liberally construed. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) In addition, we are not bound by the trial court's stated reasons in support of its ruling; we review the ruling, not its rationale. (*Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.)

When the defendant is the moving party, he must show either (1) that the plaintiff cannot establish one or more elements of a cause of action, or (2) that there is a complete defense. If that burden of production is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850; Code Civ. Proc., § 437c, subd. (*o*)(2).)

II. *Fraud and Negligent Misrepresentation Claims*

Citibank contends that the trial court erred in granting summary adjudication on Citibank's claims for fraud and negligent misrepresentation. We agree.

The elements of a cause of action for fraud are defined by case law as the false representation of a material fact, knowledge of its falsity, intent to defraud, and justifiable reliance resulting in damage. The absence of any one of these elements precludes recovery. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.)

Negligent misrepresentation, like fraud, is a form of actionable deceit. It is distinguished from fraud by the absence of two elements: knowledge of falsity, and intent to defraud. " 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation . . . .' [Citations.]" (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407 (*Bily*).) "Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact. [Citation.]" (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696.)

In this instance, defendant never disputes that he signed thousands of NSF checks totaling millions of dollars on behalf of the Shen dealerships. Nevertheless, he contends he was entitled to summary adjudication as a matter of law because Citibank failed to establish elements common to both fraud and negligent misrepresentation. Specifically, he asserts a failure to establish (1) that he made a false representation; and (2) that Citibank justifiably relied on his representation. We discuss each argument in turn.

Citing to *Williams v. United States* (1982) 458 U.S. 279, 284-285 (*Williams*), defendant asserts the United States Supreme Court has determined that presenting NSF checks does not constitute a factual assertion of any kind, and thus cannot be characterized as a false statement or representation. Citibank counters that the *Williams* case merely held that depositing a bad check is not a false statement for purposes of interpreting one specific federal criminal statute—Title 18 United States Code section 1014 (hereafter section 1014). Citibank is correct.

In *Williams,* the Supreme Court interpreted section 1014, which makes it a crime to make a "false statement" to financial institutions insured by the Federal Deposit Insurance Corporation (FDIC).[3] Williams had written a series of checks between his accounts in different federally insured banks in a check kiting case. Williams was convicted by a jury in federal district court of two counts of violating section 1014, which convictions were later affirmed by the United States Court of Appeals for the Fifth Circuit. (*Williams, supra,* 458 U.S. at pp. 280-283.)

The Supreme Court reversed, concluding that Williams's actions did not involve the making of a "false statement" within the meaning of section 1014. The court reasoned that "technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.' . . . Each check did not, in terms, make any representation as to the state of [Williams's] bank balance." (*Williams, supra,* 458 U.S. at pp. 284-285.) The court conceded that its description of checks was a "technical one," but concluded that adopting a narrow interpretation of the criminal statute was appropriate for several reasons: First, section 1014 did not explicitly prohibit the check kiting conduct in question. Second, the government's interpretation of section 1014 could give rise to criminal liability for the deposit of a single check in a federally insured bank if it was knowingly supported by insufficient funds, whether or not the drawer had an intent to defraud. (*Williams,* at p. 286.) The court remarked that under the approach taken by the Fifth Circuit Court of Appeals, violation of section 1014 did not require that a defendant engage in an extended scheme to pass a number of bad checks or to obtain credit fraudulently. (*Williams,* at pp. 286-287.) "[I]f Congress really set out to enact a national bad check law in [section] 1014, it did so with a peculiar choice of language and in an unusually backhanded manner. Federal action was not necessary to interdict the

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[3] Section 1014 makes it a crime to "knowingly [make] any false statement or report, or willfully [overvalue] any land, property or security, for the purpose of influencing in any way the action of [certain enumerated financial institutions, among them banks, the accounts of which are insured by the FDIC], upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan . . . . "

deposit of bad checks, for, as Congress surely knew, *fraudulent checking activities already were addressed in comprehensive fashion by state law*. [Citations.] Absent support in the legislative history for the proposition that [section] 1014 was 'designed to have general application to the passing of worthless checks,' [citation], we are not prepared to hold [Williams's] conduct proscribed by that particular statute." (*Williams,* at p. 287, fn. omitted, italics added.)

Thus, the *Williams* case simply held that depositing a bad check in a federally insured account is not a "false statement" for purposes of section 1014. (*Williams, supra,* 458 U.S. at pp. 284-285; accord *United States v. Boren* (9th Cir. 2002) 278 F.3d 911.) The Supreme Court made plain that its decision was limited to interpreting section 1014, and that the opinion was not meant to affect state laws proscribing fraudulent checking schemes. (*Williams*, at pp. 287.)

Under California law, the unqualified tender of a check *is* considered a representation that there are sufficient funds to cover it at the bank holding the account where the check was drawn. (*People v. Poyet* (1972) 6 Cal.3d 530, 536; *Wilson v. Lewis* (1980) 106 Cal.App.3d 802, 808.) The Shen dealerships divided the responsibility for preparing and signing checks among different employees. Defendant contends that his sole responsibility was to execute the checks in question, and he relied on the business office to draft the checks and ensure there were adequate funds on deposit. He argues his role was too limited to constitute a representation under California law. We are not persuaded. It is undisputed that defendant owned 20 percent of Shen Lincoln-Mercury and was the general manager of that dealership. We are unwilling to find, as a matter of law, that an owner/manager who signs checks has not made a representation that there are sufficient funds to cover the checks merely because the business delegates the original drafting of the check to another.

Even if we were to accept defendant's contention that one who simply signs an NSF check cannot be liable for misrepresentation, this would shift the burden to Citibank to raise a triable issue of fact on the precise role played by defendant. Citibank presented evidence of a large scale fraudulent check scheme in which defendant signed more than

17,500 checks which did nothing more than appear to move funds from one account to another and create the false appearance of large positive balances. Citibank's evidence suggests that defendant acted in concert with the Shen dealerships, plaintiff's branch operations manager and others to defraud Citibank of millions of dollars by passing thousands of worthless checks between the dealerships' checking accounts held at Citibank's San Mateo branch. This evidence raises a triable issue as to the extent of defendant's involvement in the alleged scheme and precludes our ruling as a matter of law that his conduct did not constitute a representation.[4] Indeed, the nature and scope of the challenged activities in this case are so vast as to make the evidence also material to proving the *knowledge of falsity* and *intent to defraud* elements of the fraud claim, and to proving the *no reasonable ground for believing the checks were valid* element of the negligent misrepresentation claim.

Next, defendant argues that summary adjudication was justified on the fraud and negligent misrepresentation claims because he proved that Citibank did not rely on any representation by him. This argument rests on the contention that Citibank possessed constructive knowledge of the overdrafts through its banking records for the dealership accounts and because the operations manager knew about the overdrafts. This evidence is sufficient to shift the burden to Citibank to raise a triable issue of fact on the lack of reliance defense. We find, however, that Citibank presented ample evidence to meet its burden. Citibank's evidence included sworn statements from investigators describing how the operations manager had participated in a scheme to conceal the pattern of circular overdrafts from being discovered by her supervisors. The investigation revealed that the operations manager had fraudulently executed several documents purporting to verify the existence of lines of credit extended by Citibank to Shen Motor and Shen Lincoln-Mercury, when the bank had no record of any commercial loan or line of credit ever having been applied for or extended to those dealerships. Citibank also presented

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[4] Under Penal Code section 476a, it is illegal to willfully, with intent to defraud, make, draw, utter, *or* deliver any check if one knows at the time of the act that there are insufficient funds in the account to allow payment of the check.

copies of checks drawn on Michael Shen's personal account during the period from May 1997 through April 1999, totaling $64,500, that had been deposited in the personal account of the operations manager. Viewed together, this evidence is sufficient to raise a triable issue of fact whether Citibank should be charged with the knowledge of its operations manger and the records she maintained so as to preclude a finding of reliance as a matter of law.[5]

Defendant failed in his burden to negate one or more of the elements of the causes of action for fraud and negligent misrepresentation, and therefore was not entitled to summary adjudication on these claims.

III. *The Negligence Claim*

As the parties seem to recognize in their briefing, the seventh cause of action for negligence restates the contention set out in the sixth cause of action that defendant negligently misrepresented to Citibank that there were sufficient funds to cover the checks he signed. In support of the court's grant of summary adjudication on the negligence cause of action, defendant raises one argument in addition to those already resolved in part II: as a noncustomer who merely served as the designated signator for a customer, he owed no legal duty to Citibank. We disagree.

As we understand the defendant's argument, it rests on the false premise that only a person in privity with a bank owes it a duty of care. In fact, every person owes a duty, even in the absence of privity of contract, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. (Civ. Code, §§ 1708, 1714, subd. (a); *Bily, supra,* 3 Cal.4th at pp. 396-397.) "The duty is of ordinary care under all the circumstances, and it varies with changing circumstances. The standard is that of the 'ordinary prudent or reasonable person.' [Citations.]" (6 Witkin, *Summary of California Law* (9th ed. 1988) Torts, § 750, pp. 87-88.)

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[5] For the same reasons, we find defendant's estoppel assertion lacks merit.

In support of his contention that no duty should be imposed here, defendant relies on the well-established legal principle that banks do not owe a duty to a noncustomer. (*Roy Supply, Inc. v. Wells Fargo Bank* (1995) 39 Cal.App.4th 1051, 1076 (*Roy*); *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1628 (*Dodd*).) Defendant then argues that the converse is also true. For example, in *Roy* a bank paid checks forged on the accounts of two corporate customers. The two corporate customers and the president and part owner of each of the corporate customers sued the bank for negligence. The court held that the corporate customers were precluded by California Uniform Commercial Code section 4406 from asserting the forged checks against the bank because they failed to discover and report the forgeries to the bank in a timely fashion. (*Roy*, at p. 1055.) The noncustomer, individual plaintiff had sued on the basis that the bank's improper payment led to his personal responsibility for the corporate plaintiffs' state and federal taxes and, as a result, he was injured in his 'health, strength, activity and marital relations, sustaining injury to his nervous system and person, all of which injuries have caused . . . [him] great mental, physical and nervous pain and suffering.' " (*Id.* at p. 1057.) The court held that the bank owed no duty of care to this individual. (*Roy*, at p. 1076; *Dodd*, at p. 1628 [same].)

Two significant differences between our case and cases like *Roy* and *Dodd* lead us to reject *Roy* and *Dodd* as analogous. First, a critical factor in determining whether to impose negligence liability in the absence of privity is the public policy in favor of preventing future harm. (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650; accord, *Bily, supra,* 3 Cal.4th at p. 397.)[6] We believe a bank's liability to its customer should suffice

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[6] The California Supreme Court has outlined the factors to be considered when imposing negligence liability in the absence of privity. "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja v. Irving, supra,* 49 Cal.2d at p. 650; accord, *Bily, supra,* 3 Cal.4th at p. 397.)

to ensure the bank's care in handling transactions. Certainly we have no basis to conclude that creating an additional duty to noncustomer officers and owners of corporate customers will serve the public interest by materially improving a bank's performance. In addition, creating such a duty may vastly expand the number of possible plaintiffs and the types of claims and create "potential liability far out of proportion to . . . fault." (*Bily*, at p. 398.)

The situation is vastly different in the present case. There is no dispute defendant was one of three authorized signators to several related corporate checking accounts and in that capacity signed thousands of NSF checks that purported to transfer millions of dollars between the accounts. At the time defendant executed these checks, he served in a management position and had a substantial ownership interest (20 percent) in one of the Shen entities that directly benefited from the alleged scheme. This is not, in other words, a situation where an employee of a business, without any management responsibility or ownership interest, signs NSF checks to creditors of the business. In our case, defendant's conduct was intended to affect Citibank, and the foreseeability of harm to the bank was acute. Defendant had to be aware that if Citibank honored these checks and the implied representation that the checks were supported by sufficient funds was false, Citibank would suffer the very loss that in fact occurred. Since there were not sufficient funds to cover the checks, but for defendant's conduct Citibank would not have suffered the loss. Substantial moral blame attaches to the conduct alleged by Citibank. Most significantly, given the role defendant is alleged to have played in the Shen entities and in the check scheme, the policy of preventing future harm is well served by finding a duty here. A corporation in desperate financial straits has little economic incentive to avoid the future liability that may result from current chicanery. By imposing a duty of care on owner/manager, like defendant, we ensure that one in a position to benefit substantially if the check scheme flourishes, is not immune from personal liability if it is discovered. In addition, the bank is the only potential plaintiff and liability will remain directly tied to

fault. We thus conclude that defendant owed a duty of care to Citibank and reverse the summary adjudication of the negligence cause of action.[7]

IV. *The Conspiracy Claim*

The trial court granted summary adjudication in favor of defendant on the conspiracy cause of action based on defendant's argument that there could be no conspiracy liability for fraud if the trial court granted summary adjudication in favor of defendant on the fraud claim. Since we have concluded that summary adjudication should have been denied on the fraud claim, we conclude that the conspiracy claim must be reinstated as well.[8]

V. *Conversion*

Finally, Citibank contends that granting summary adjudication to defendant on the conversion claim was error. We disagree.

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[7] Defendant also relies on *Shapiro v. United California Bank* (1982) 133 Cal.App.3d 256 and *Hoffman v. Security Pacific Nat. Bank* (1981) 121 Cal.App.3d 964 to argue against finding a duty. In each of these class actions (filed in 1974), the plaintiffs sued on the theory that the bank's practice of assessing fees for processing NSF checks constituted an unlawful penalty under Civil Code sections 1670 and 1671 then in effect. In order to establish their claim, the plaintiffs first had to establish that there was an implied agreement with the banks not to write an NSF check, for only then could they argue that the fee assessed for processing the check constituted improper liquidated damages for the breach of an agreement. In each case the court held simply that no such implied agreement existed. Neither case considered the duty of care owed to a bank to avoid making false representations.

[8] In light of the foregoing determination, we need not consider Citibank's other challenges to the granting of summary adjudication on the cause of action for civil conspiracy, asserting that defendant can be held liable (1) based on aiding and abetting the fraud and conversion of other Shen defendants; and (2) asserting that defendant can be held liable because the trial court has since granted summary judgment in Citibank's favor against other Shen defendants on the fraud and conversion claims. As to the latter challenge, we exercise our discretion to deny Citibank's August 30, 2002 motion to augment the record to include the judgment entered in its favor against other Shen defendants, since that judgment is not relevant to the basis on which we resolve this portion of the appeal. (Cal. Rules of Court, rule 12; see *Russi v. Bank of America* (1945) 69 Cal.App.2d 100, 102.) Defendant's related September 20, 2002 motion for sanctions is denied.

" 'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use.' [Citation.]" (*Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324, 1329.) The elements of a cause of action for conversion are: (1) plaintiff's ownership of the property or right to possession at the time of conversion; (2) defendant's conversion of the property by wrongful act or disposition of plaintiff's property rights; and (3) damages. (*Ibid.*) "Because the tort of conversion is a species of strict liability, defendant's good faith, ignorance, mistake or motive is irrelevant and does not constitute a defense. [Citations.]" (*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 747-748.)

Here, defendant made several attacks on this cause of action. We need only decide one of them: since the funds taken from Citibank were not segregated as part of a separate fund, the cause of action for conversion fails as a matter of law. Traditionally, an action for conversion would lie only where tangible property was involved. (1 Harper et al., The Law of Torts (3d ed. 1996) Interference with Chattels, § 2:13, p. 2:51.) Though many of the historic limitations on a conversion claim for money have eroded over time, they have not been completely erased. Thus, it is generally true that "money cannot be the subject of a conversion action unless a specific sum capable of identification is involved. [Citation.]" (*Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 485*; Shahood v. Cavin* (1957) 154 Cal.App.2d 745, 747, 748.) Though this does not require a plaintiff to demonstrate that "each coin or bill be earmarked" (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681), it is insufficient simply to calculate a reasonably precise amount of loss. In *Software Design & Application, Ltd.*, for example, certain banks were sued for the conversion of money deposited by the plaintiffs' financial consultant in the consultant's accounts. The plaintiffs calculated the loss with no apparent difficulty, but the court found a cause of action for common law conversion could not be stated. "As to the banks there are no

allegations that as money in varying amounts was wired into the accounts, it was held in escrow or in some otherwise segregated fund for the benefit of [Software Design & Application, Ltd.] Rather, it came into the [consultant's] accounts over time, in various sums, without any indication that it was held in trust for [Software Design & Application, Ltd.]" (*Software Design & Application, Ltd.*, at p. 485.)

The only exception to this requirement occurs when the defendant is the plaintiff's agent. In *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, a sales agent (North State) received a total of $108,174.78 in proceeds from sales made on behalf of Cottonwood's consigned farm products. North State commingled the proceeds in its general corporate account and then went out of business before paying the proceeds to Cottonwood. (*Id.* at p. 1071.) Because North State was not obligated to segregate the proceeds from their corporate account, North State argued that the trial court erred in finding it liable for conversion. (*Id.* at p. 1072.) Relying on the fiduciary relationship established by the written agency agreement between the parties, the appellate court found that commingling the proceeds owing to Cottonwood in North State's corporate account with North State's other funds did not preclude recovery based on conversion. (*Id.* at pp. 1073-1074; see also *Haigler v. Donnelly, supra,* 18 Cal.2d at p. 681.)

It is undisputed by the parties that the funds allegedly converted by the circular overdraft scheme were commingled with other funds deposited in the Shen dealership accounts. Since there is no contention that an agency relationship existed between defendant and Citibank, the trial court properly granted summary adjudication to defendant on the conversion cause of action.[9]

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[9] Citibank raises one additional argument. It contends summary judgment should not have been granted because defendant's motion left Citibank's "fraud by concealment" claims pending. The complaint contains no cause of action denominated "fraud by concealment." Instead, Citibank relies upon paragraph 78 (within the fraud claim) and paragraph 89 (within of the negligent misrepresentation claim), which address why Citibank did not discover the fraud sooner, so as to negate any potential defense that the action was barred by the statute of limitations. Citibank did not raise the "fraud by concealment" argument in its opposition points and authorities or in its separate statement, briefly mentioning it for the first time during argument on the motion for

VI. *Damages*

Defendant contends that summary judgment would have been justified on a separate basis not found by the trial court; namely that Citibank was precluded by one of its interrogatory responses from providing any evidence on the issue of its damages. We disagree.

In response to form interrogatory No. 9.1, asking Citibank to specify the nature, date and the amount of "any other damages that [Citibank attributes] to the INCIDENT," Citibank objected on grounds including vagueness and overbreadth, and responded that it had suffered "monetary damages" from "approximately 1996 through June 1999," and "in an amount not less than $20 [million] by Alexander Shen . . . and others . . . ." Defendant contends this response, given just two weeks before the scheduled trial date, should have precluded Citibank from providing other evidence of its damages. Defendant relies upon the legal principle that "where a party in discovery has made an admission which justifies summary judgment in favor of his opponent, he cannot attempt to defeat the summary judgment motion by submitting a declaration contradicting the admission." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 961.)

Defendant's argument is unsupported by the above-quoted legal principle because the interrogatory response does not constitute an *admission* by Citibank. To the contrary, the response made an affirmative claim of damages, albeit a general one, of not less than $20 million. Notably, Citibank also stated in response to the very next form interrogatory (No. 9.2) that it possessed documents supporting the existence or amount of the damages it was claiming, and that the documents were available to defendant for inspection and

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summary judgment. We decline to address this argument because Citibank did not adequately raise it in the court below. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31 [possible theories not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal].) In light of this determination, we exercise our discretion to deny defendant's August 9, 2002 motion to augment the record with the complaint filed by Citibank on May 28, 2002, in San Mateo Superior Court Case No. CIV423079, alleging a cause of action against defendant denominated "Fraud by Concealment."

copying. Under these circumstances, we agree with the trial court's implicit determination that Citibank's response to form interrogatory No. 9.1 did not preclude Citibank from presenting evidence of its damages in opposition to the motion, or shift the burden of proof to Citibank to raise a triable issue of fact on the element of damages.

Defendant has not met his burden to show he was entitled to summary judgment.

DISPOSITION

The judgment is reversed. The order granting summary judgment is reversed. The order granting summary adjudication of the causes of action for fraud, negligent misrepresentation, negligence, and conspiracy is reversed and remanded for further proceedings in the trial court. The order granting summary adjudication of the causes of action for conversion and constructive trust is affirmed. The parties shall bear their own costs on this appeal.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.